FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HERMAN I. and CORA E. SHALLER,
Petitioners,

v.

ARTHUR A. WALKER,

and

LEISURE WORLD COMMUNITY CORPORATION,
LEISURE WORLD OF MARYLAND CORPORATION,
MONTGOMERY MUTUAL, INC.,
ROBERT E. SULLIVAN,
RITA S. RAMSEY, and
RICK PITMAN,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of Maryland deviated from and ignored violations of U.S.C. Title 15—COMMERCE AND TRADE, SUBCHAPTER II—ASBESTOS HAZARD EMERGENCY RESPONSE, and EPA 40 CFR Part 763, the violations of which caused irreparably destructive damages to Petitioners?

2. Whether the Court of Appeals of Maryland deviated from and ignored violations of the NINTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

3. Whether the Court of Appeals of Maryland deviated from and ignored violations of the FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioners, Herman I. and Cora E. Shaller are individuals, husband and wife.

Respondents:

Arthur A. Walker is an individual represented by Leisure World of Maryland Corporation as the "current owner" of the shares for cooperative unit #82C in 1993;

Leisure World Community Corporation represents and manages the Leisure World Community known as Leisure World of Maryland, in Montgomery County, Maryland;

Leisure World of Maryland Corporation is the "managing agent" for Leisure World Community Corporation;

Montgomery Mutual, Inc. is a cooperative housing development within the Leisure World of Maryland community;

Robert E. Sullivan is the General Manager for Leisure World of Maryland Corporation;

Rita S. Ramsey is the Property Manager for Montgomery Mutual, Inc.;

Rick Pitman is the designated Coordinator and Inspector for RENOVATION OF RESALE UNITS.

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PETITION FOR WRIT OF CERTIORARI

Herman I. & Cora E. Shaller—Plaintiffs in this case in the Circuit Court for Montgomery County, Maryland, Appellants in the Court of Special Appeals of Maryland—respectfully petition this Court to issue a writ of

certiorari to review the Order of the Court of Appeals of Maryland in Herman I. Shaller et ux. v. Arthur A. Walker, and Herman I. Shaller et ux. v. Leisure World Community Corp. et al., Petition Docket No. 282, September Term, 1996, dated December 11, 1996.

OPINIONS BELOW

The Court of Appeals of Maryland ORDER dated December 11, 1996 as to which review is sought, is in response to Petitioners' Request for Reconsideration of the Petition for a Writ of Certiorari to the Court of Special Appeals Filed November 13, 1996 responding to the Court of Appeals' Order dated November 7, 1996, reprinted in the Appendix to this petition (Pet. App.) as Appendix A, Pet. App. 1a. The unreported decision of the Court of Special Appeals dated June 7, 1996 is reprinted as Appendix B to this petition, Pet. App. 7a. The underlying rulings, decisions, and judgments in the Circuit Court are reprinted as Appendix C to this petition, Pet. App. 15a.

JURISDICTION

The opinion of the Court of Appeals of Maryland was issued on November 7, 1996, Pet. App. 6a. A timely request for reconsideration (Pet. App. 2a) was denied on December 11, 1996, Pet. App. 1a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Section 2614 of U.S.C. Title 15—COMMERCE AND TRADE, states that "It shall be unlawful for any person to fail or refuse to comply with any requirement of subchapter II of this chapter or any rule promulgated or order issued under subchapter II of this chapter.".

Section 2643. EPA regulations for warning labels for schools and public and commercial buildings defined to include apartment complexes, condominiums and cooperatives of more than 10 units requires that "The warning label shall read, in print that is readily visible because of large size or bright color, as follows: "CAUTION: ASBESTOS, HAZARDOUS. DO NOT DISTURB WITHOUT PROPER TRAINING AND EQUIPMENT."

The above label was missing from the front door of Unit 82C in Leisure World of Maryland on April 2, 1993. (Petitioners' Complaint filed 1/3/95, dismissed as to Leisure World by Judge Ryan on 5/31/95, includes a copy of the required EPA label as Exhibit #6 which was missing as noted above).

CONSTITUTIONAL PROVISIONS INVOLVED

Ninth Amendment—Petitioners' rights of personal security and bodily integrity were violated.

Fourteenth Amendment—No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Facts

Petitioners entered into a RESALE CONTRACT FOR COOPERATIVES at Leisure World in Maryland to purchase shares of stock in accordance with "Proprietary Documents" pertaining to and covering Cooperative Unit 82C. The Contract was signed and ratified on 2/17/93.

One of the proprietary documents, *STANDARDS FOR THE RENOVATION OF RESALE UNITS Effective*

August 1, 1989, is a Unilateral Contract. Leisure World Community Corporation is the Corporate Owner of Unit 82C, and Leisure World of Maryland Corporation is the Renovation Contractor for Unit 82C.

After ratification of the Sales Contract, Petitioners promptly proceeded with an application for co-op membership which was approved on 2/25/93.

Respondent Arthur A. Walker, in an Affidavit dated 2/13/95, states that he spent thirty (30) days (during February and March 1993) removing "personal items" and "carpet" from the co-op unit.

On March 4, 1993, Leisure World Respondent Rita Ramsey informed Petitioner Herman Shaller that renovation of the Unit was currently underway. However, Respondent Walker swears that he was removing "personal items" and "carpet" from the Unit at that time, the same time that renovation of the unit is allegedly underway, and notwithstanding that interference with any renovation currently underway is not permitted under Leisure World's Unilateral Contract.

On March 29, 1993, Petitioners met with the Bank Escrow Clerk who informed Petitioners that the unit was ready for settlement. However, she had not received Leisure World's "Resale Renovation Statement" required for confirmation that the Unit had been Renovated and was ready for Settlement.

At approximately 4:00PM on March 31, 1993, Ms. Ramsey, the Property Manager for Unit 82C called Petitioners at home to inform them that Renovation of the Unit was completed and that she could now schedule the Post-Renovation Inspection required under Leisure World's Unilateral Contract. Accordingly, the inspection was scheduled for 10:00AM on April 2, 1993. Petitioners were told to report to the Office to meet with her and Mr. Pitman, the Renovation Coordinator and Inspector. Mr. Pitman would then drive Petitioners to Unit 82C and

accompany them through the Unit during the inspection, a duty required under Leisure World's Unilateral Contract.

When Petitioners arrived at the Co-op Office on April 2, 1993 at approximately 9:45AM, Ms. Ramsey stated that she had made other arrangements as to Mr. Pitman who was told to meet Petitioners at the Unit. When Petitioners met Mr. Pitman at the Unit, he opened the door and Petitioners followed him into the kitchen at which time he said that he could not stay for the inspection because he had other things to do.

Petitioners were thereby lured into the unit and left alone by Leisure World Respondents although it was their *duty* to accompany Petitioners, and their responsibility to answer questions and to note the renovation deficiencies which would have to be corrected.

Respondent Walker was absent.

Walker's Prudential Real Estate Agent, Michael Williams, who personally called to inform Petitioners that he would accompany them for the scheduled inspection, was absent.

Petitioners were abandoned by all participants scheduled to appear for inspection of the unit on April 2, 1993 at 10:00AM. Each participant, expected, and/or required to do so, failed to arrive to accompany Petitioners without any warning by anyone as to why.

On April 5, 1993, Mr. T.J. Murphy of Prudential, Respondent Walker's Agent, called and told Herman Shaller that the broken floor tiles throughout the house were asbestos tiles and that it would be difficult to replace them.

Mr. Murphy's telephone call on April 5, 1993 illuminated and revealed why no one was willing to participate in the inspection. Petitioners were lured into the unit by Respondents without any warning by anyone as to the existing asbestos hazard and the existing hazardous physi-

cal condition of Unit 82C which was an obstacle course to walk through, notwithstanding Respondents' duty to accompany Petitioners and to note and explain deficiencies which would have to be corrected.

Residents, and people visiting Leisure World in Maryland, including children and grandchildren, have been unsuspecting victims of exposure to asbestos fibers contained in, and/or emanating from, apartment buildings and attached townhouses of the Cooperative Housing Area of Leisure World identified as Montgomery Mutual, Inc.

The cooperative housing area consists of 93 buildings containing 898 residential units and occupies approximately 70 acres.

Petitioners frequently visited Leisure World for approximately ten (10) years and were unsuspecting victims until informed, after the fact, and without prior warning by anyone, that they had been exposed to asbestos fibers. That exposure occurred during inspection of a cooperative townhouse (Unit 82-C) on April 2, 1993. It had been misrepresented as ready for settlement, possession, and occupancy under a Sales Contract with the owner of the cooperative shares of that unit, and under a unilateral Contract with Leisure World of Maryland Corporation, contractor responsible for renovating Unit 82-C.

The information that Petitioners had been exposed to asbestos came from the Real Estate Agent representing the Seller of the shares for Unit 82-C on April 5, 1993.

Subsequent correspondence from the Leisure World Property Manager for Unit 82-C dated April 15, 1993, states that, "the referenced unit contains no asbestos." That statement was false.

A laboratory test was subsequently demanded by Petitioners' Attorney James E. Savitz in correspondence to Ms. Ramsey dated April 20, 1993. Accordingly, a bulk

sample of friable asbestos floor tile, ubiquitous throughout the entire house, except for the kitchen and the bathrooms, was submitted for test by Leisure World in a 35mm film can. The test revealed that Petitioners' exposure to asbestos fibers was approximately seventy (70) times the intensity defined as hazardous under Maryland and Federal law.

2. Proceedings Below

Hearing before Judge Thompson on March 24, 1995.—Judge Thompson's Judgment granting Mr. Walker's motion for summary judgment and Order to reimburse Arthur A. Walker for attorneys fees and costs that he incurred in defending against the litigation of a contract case was an error for the following reasons:

(1) The Complaint was filed as a Tort Action—Not Contract.

(2) The incident complained of occurred on April 2, 1993. In Maryland, the statute of limitations is three (3) years. Therefore, any suit which is filed based upon that incident would have to be filed before April 2, 1996 or the claim may be forever barred. The claim for damages caused as a result of exposure to asbestos was timely filed.

(3) Judge Thompson acknowledged Plaintiffs' exposure to asbestos as equivalent to that of shipyard workers who have not yet become ill, or "we do not know that you are ill" (see Transcript p. 15, lines 24-25, p. 16, line 3, and p. 16, lines 6-7). Judge Thompson also suggested that it would be more appropriate for Plaintiffs to come back to court if and when they get sick (see Transcript p. 10, lines 13-18).

(4) Judge Thompson stated that he was not going to impose sanctions upon Plaintiffs, and then did so by signing the Order drafted by Mr. Walker's attorneys. (see

Transcript p. 26, lines 2-7). The words and conduct of Judge Thompson in this instance is incongruous.

(5) Judge Thompson's assertion that, "You have visited anxiety on a man who has never met you, talked to you or had anything to do with you and you sued him" was without basis. It was an assertion which is false. (See Transcript p. 25, lines 12-14.)

(6) Mr. Walker lied in his Affidavit prepared and used as evidence for which he was granted summary judgment. Mr. Walker knew he was lying when he signed that Affidavit, as did his attorney, Kim Viti when she filed that Affidavit as evidence for which summary judgment was granted.

Hearing before Judge Ryan on May 31, 1995.—Judge Ryan's ruling on May 31, 1995 (Pet. App. 17a) was arbitrary and capricious. He did not cite any violation of any Maryland rules nor did he refer to any corrections required in pleading fraud and deceit and conspiracy, count I and count II in the Amendment of Pleadings filed May 25, 1995 as causes of action for which relief can be granted.

Furthermore, since his ruling applied only to the Leisure World Defendants, it was reasonably assumed that compliance with his ruling would be met by following Rule 2-341—Amendment of Pleadings, i.e., to "set forth a better statement of facts" as to Leisure World Defendants' issues already raised in the Complaint filed Jan. 3, 1995 and the Amendment of Pleadings filed May 25, 1995.

Judge Ryan also cancelled the discovery process period which was to be scheduled on June 2, 1995.

Hearing before Judge Ryan on September 7, 1995.—Judge Ryan's granting Leisure World's motion to dismiss the Amended Complaint With Prejudice and his Award

of Attorneys Fees in the Amount of Two Thousand Dollars Against Both Plaintiffs was an error. (Pet. App. 17a.)

In addition to the reasons and arguments in the record, Judge Ryan was obviously confounded and confused when he stated that "I have read your amended complaint. I have read the motion to dismiss, and I have read your opposition to it, and I have read the defendant's answer and your response.". But the last two (2) documents Judge Ryan claimed to have read with reference to Leisure World's motion to dismiss were imaginary. There was no Defendants' Answer, and there was no Plaintiffs' Response as cited by Judge Ryan (see Transcript p. 10, lines 7-10, and p. 11, lines 8-17).

Judge Ryan did not acknowledge, and did not indicate inclusion of Plaintiffs' Amendment of Pleadings filed on May 25, 1995 nor the Complaint filed January 3, 1995 in his dismissal of the Amended Complaint With Prejudice.

Specifically, Plaintiffs' Amendment of Pleadings filed May 25, 1995 clearly pleads causes of action upon which relief can and should be granted. These are:

Count I—Fraud and Deceit, and

Count II—Conspiracy to Interfere With Plaintiffs' Prospective Advantage of Living in Leisure World.

Hearing before Judge Chapin on August 8, 1996.—Judge Chapin's Judgment and Order filed Aug. 16, 1996, "entered in favor of Defendant Arthur A. Walker and against Plaintiffs, Herman I. Shaller and Cora E. Shaller, jointly and severally, in the amount of $3,797.26 and interest from the date of this Order" was obtained by Fraud and Deceit by Defendant Walker *and* his Attorneys, and the Ex-Parte Irregularity by Judge Chapin which occurred in the Circuit Court while the case was under the jurisdiction of the Court of Appeals of Maryland

pending a decision as to the Petition for a Writ of Certiorari. (Pet. App. 18a-30a.)

The resulting damages included exacerbation of mental anguish, emotional distress, and additional Pecuniary Damages, subsequent to the Injuries and Damages caused by the exposure to asbestos.

The Unreported Conclusions of the Court of Special Appeals

The conclusions of the Court of Special Appeals (Pet. App. 7a) are based upon factual distortions, omissions and lies by the Respondents, and premises which are not true.

The Court's argument that "it is unreasonable for the Shallers to be worried about future asbestos related consequences" is disingenuous.

As to the Court's reference to "any other jurisdiction," and as to Plaintiffs' "Mental Anguish"; in *Shelton v. College Station* (1985, CA5 Tex.) 765 F.2d 456 (applying Texas law), the Court allowed plaintiff to recover for his mental anguish relating to his fear that his exposure to asbestos had increased his risk of developing cancer and mesothelioma in the future. The Court commented that people today are sensitive to the dangers of cancer, and that mental anguish would reasonably follow after the plaintiff was informed by a reliable source that his exposure to asbestos products had heightened his risk of developing deadly diseases.

REASONS FOR GRANTING THE WRIT

Research reveals that "The magnitude of the asbestos problem is staggering in its extent, severity, and societal cost . . . there are clinicians and epidemiologists who now speak of a 'mesothelioma epidemic' and this possiblility casts grave concern on the value of current permissible exposure levels and asbestos control criteria. . . .

There are troubling inferences concerning the health effects of low level asbestos exposures, very low level of cumulative exposures, and brief sporadic exposures relative to human carcinogenesis."

It has also been established that the relationship between asbestos exposure and mesothelioma is one of "cause and effect". (Reference: Current Asbestos Legal, Medical and Technical Research, Volume 10 of the Sourcebook on Asbestos Diseases. Butterworth Legal Publishers, 1994).

Damages are triggered by the initial inhalation of asbestos fibers, and by exposure-in-residence to the fibers, *meaning the continuing damage inflicted upon lung tissue by asbestos fibers that had already been inhaled.*

There can be no ambiguity about public policy consideration in this case pursuant to U.S. Code Title 15-Commerce and Trade, Subchapter II-Asbestos Hazard Emergency Response which also specifies that "It shall be unlawful for any person to fail or refuse to comply with any requirement of subchapter II of this chapter or any rule promulgated or order issued under subchapter II of this chapter".

There is no known minimal dose which is safe for the inhalation of asbestos dust and fibers. Furthermore, there is no effective treatment to reverse or repair the "bodily injury", the effects of which are proximate, prospective, irreparable, and permanent damages which follow as results of the inhalation.

The Court's holding in *Civil Action No. 6:93cv526 in the United States District Court for the Eastern District of Texas, Tyler Division*, "was based upon a finding that 'bodily injury' existed continuously from the moment of first inhalation by a claimant of asbestos fibers to the date of manifestation of injury or filing a claim (whichever comes first)."

The level and density of asbestos dust and fibers in the townhouse (Unit 82C) during April 1993 was seventy (70) times the amount defined as hazardous under Maryland and Federal Law. The exposure on April 2, 1993 was not limited to a two (2) hour period of inhaling seventy (70) times the amount Federal Law and the State of Maryland defines as hazardous; the reprehensible factor here is that Petitioners were lured into the house by acts of fraud and deceit by Respondents acting in concert. Furthermore, Petitioners unknowingly took all the asbestos dust and fibers which had gathered upon them, on their clothes and shoes, in their hair, ears, nose and throat, and which were unknowingly brought home and contaminated their house and everything in it.

It is a matter of record that a mother of two (2) sons died of mesothelioma (lung cancer) notwithstanding that her only exposure to asbestos occurred when she washed the work clothes worn by both sons who were living at home while they worked at a factory where they and their clothes were exposed to asbestos. (Outrageous Misconduct, by Paul Brodeur, Pantheon Books, New York, 1985. The Case of the Tyler Plant, p. 93).

Seventy (70) times the amount of asbestos dust and fibers defined by Federal and Maryland Law as being hazardous (creates a substantial and unreasonable risk of death or personal injury), translates arithmetically into the equivalent of two (2) hours of exposure per day for seventy (70) days or an hour every day for one hundred forty (140) days or almost five (5) months of consecutive daily exposure. This is no "Mere exposure to asbestos, to the minor extent" described by the Court of Special Appeals in its decision, notwithstanding that levels of prior asbestos exposures at Leisure World are not known.

Prior to Petitioners' knowledge that they had been exposed to a high density level of asbestos fibers, Petitioners

considered initiating proceedings to enforce the Sales Contract and to enforce Leisure World's Renovation Contract to satisfactorily renovate the unit.

After Petitioners were informed of the substantial and unreasonable risk of death or personal injury associated with exposure to asbestos, and that they had been visiting Leisure World for approximately ten (10) years prior to the unlawful exposure in Unit 82C on April 2, 1993 which Respondents had concealed, Petitioners had no choice but to struggle with the reality of the irreparable damage already caused, and that Respondent Walker and Leisure World Respondents were deceitful and could not be trusted.

Accordingly, Petitioners were advised by their Attorney, James E. Savitz to release Prudential Preferred Properties and Jeanette Walker from the Sales Contract as of April 30, 1993. However, Respondent Arthur A. Walker was not released from the TORT he committed in concert with Leisure World Respondents, independent of that contract. Furthermore, his own statements of his activity, and the fraud he revealed, in his Affidavit of 2/13/95, for the period 2/17/93 to 4/30/93, had been concealed by him and Leisure World Respondents until he filed his Affidavit in the Circuit Court for Montgomery County, Maryland on 2/16/95. If he maintains his claim as that of an agent for a principal, the principal is not responsible for his or her agent when the agent goes off on a lark of his own.

The indisputable fact is that Petitioners were exposed to high levels of asbestos fibers.

This exposure was the result of negligence, willful misconduct, and fraud and deceit on the part of Respondents.

Respondents' attempts to conceal the exposure were revealed by definitive laboratory analysis which proved the high level of unlawful asbestos exposure.

Respondents violated Petitioners' right to the enjoyment of health by causing irreparable damage to their health.

The right to the enjoyment of health is a subdivision of the right to personal security, one of the absolute rights of persons.

Prior to their exposure to asbestos at Leisure World, Petitioners were in excellent health and excellent physical condition.

A continuous deterioration of health and endurance of both Petitioners began shortly after the exposure on April 2, 1993.

The deterioration of health and endurance experienced by Petitioner Cora Shaller has been particularly devastating. Her good health and endurance which existed prior to her exposure has been severely and irreparably damaged and includes medical diagnoses of Exertional Dyspnea, Fatigue, Hypertension, Lymphadenopathy, and a Pulmonary Problem which "is consistent with disease at the gas exchange membrane".

On January 10, 1997, the condition of Petitioner Cora Shaller required hospitalization.

Cora Shaller's pulmonary problem and other manifestation of diseases following the exposure were ignored because, according to Judge Ryan, "This is not the trial of the case".

Personal injuries and damages following the exposure are recoverable under Maryland and Federal Law. However, Due Process of Law was denied in the Maryland Courts.

The damage to Petitioners caused by Respondents in this case was no accident. The damage was caused by a set of events and circumstances carefully orchestrated by Leisure World Respondents acting in concert with Respondent Walker to conceal and insure that Petitioners would never know that they had been exposed to asbestos during their inspection. Their conduct and operations was an organized conspiracy engaged in unlawful activities

which caused Petitioners' loss of their good health and their money.

The Respondents in this case must be held accountable for the damages caused by them.

The Decisions and Judgments in the Maryland Courts in this case are in conflict with and contrary to United States Law and Public Policy.

Petitioners' right to recover for damages caused by Respondents under Tort Law has been violated.

DUE PROCESS OF LAW HAS BEEN DENIED.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted,

Respectfully submitted,

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